Woon Kim Choy v Acexide Technology Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–562–11 OF 2022
AHMAD KAMAL J
31 MAY 2024

Labour Law — Employment — Unlawful dismissal — Applicant filed for judicial review application to quash award by Industrial Court in holding applicant was not employee of company and could not therefore claim for unlawful dismissal at Industrial Court — Whether applicant was employee of company within meaning of 'workman' under s 2 of Industrial Relations Act 1967

This was a judicial review application filed by the applicant to quash the award by the Industrial Court. The first respondent ('company') was a private limited entity. At the time of its establishment the applicant, Lim Boon Huat who was the managing director ('COW1'), and Chang Heng Keong ('CHK') were the founding members of the company, its directors and the shareholders. The company maintained the register of employees for all its employees which included the names of all the three directors of the company. By the inclusion of all the directors' names in the register of employees, the company had contributed towards Employees Provident Fund, paid Social Security Organisation contributions and monthly tax deductions. By a notice dated 14 October 2019, COW1 had requisitioned for an extraordinary general meeting ('EGM'). The EGM was convened on 6 November 2019 wherein the applicant and CHK were removed as directors of the company on that day and the company appointed COW1's son ('Jovi Lim') in their stead. At the time of his dismissal, the applicant held the position of director and in addition, held the position of a technical director and was tasked with onsite monitoring of the project works and to ensure the project to be completed within the specification and time frame required by the company's customers and to resolve any technical issue during the construction of the project. Approximately six days after his removal, the applicant and CHK issued a legal notice of demand to COW1 and Jovi Lim to demand for a buyout of their shares and to notify that they had been oppressed as minority shareholders. The applicant claimed that he was an employee of the company and was employed as a technical director and had been dismissed without just cause or excuse from his employment with the company upon his removal as a director pursuant to the EGM. The Industrial Court held that the applicant was not an employee of the company and could not therefore claim for unlawful dismissal at the Industrial Court. Hence, this application. The applicant contended, inter alia, that: (a) the EA Form (Tax Form) clearly showed that there was a distinction between the salaries received by the applicant (in his capacity as an

employee) and the directors' fees received; (b) the chairman of the Industrial Court erred in law by failing to consider that no domestic inquiry was conducted by the company; and (c) the company's failure to challenge the Minister's reference at the outset and the subsequent dismissal of the striking out application filed by the company at the Industrial Court made the company contention now that the applicant was not a workman barred by the doctrine of res judicata. The applicant had also commenced civil proceedings at the High Court against the company based on a minority oppression claim seeking reliefs aimed at winding up of the company.

Held, dismissing the application:

(1) The designation as technical director given to the applicant was not a position of employment. It was merely a 'title' given to the applicant to facilitate the applicant's task and responsibilities in respect of technical matters pertaining to the projects undertaken by the company. Therefore, the applicant's claim that he was employed by the company in the position of technical director until the date of his dismissal were without basis, untenable and clearly unproven based on the totality of evidence of the case. Next, the listing of the applicant as a director of the company in the register of employees could not mean that the applicant was an employee of the company as COW1 who was the managing director of the company was also listed on the register of employees and COW1 had maintained that he was never an employee of the company at any time. The applicant also did not have a letter of employment like other employees of the company. There was no contract of employment signed between the applicant and the company to show that the applicant was employed by the company in any position at any time as alleged by the applicant (see paras 46–47, 49 & 52–53).

(2) The scheme of the applicant's statutory contribution did not per se establish that the applicant was an employee of the company as these contributions could be made on a voluntarily basis for the benefits of all directors of the company. The EA forms that showed that there was a distinction between the salaries received by the applicant (in his capacity as an employee) and the directors' fees received were not conclusive evidence of employment. There was also no employment contract to state that the monthly director's remuneration were the applicant's salary. Next, the audited accounts of the company did not conclusively prove that the applicant was an employee of the company and had to be considered and scrutinised with the overall evidence of the case. The Industrial Court had recognised that there was conflicting evidence with regard to the payment vouchers tendered by the company and the statutory forms lodged with the governmental departments and had gone on to consider all the facts and evidence before concluding that the

applicant was not an employee of the company and as such did not show preference in the manner contended by the applicant (see paras 57, 59, 62, 64 & 68).

(3) The applicant had not been in the control and supervision of the company and acted more as the mind and brain of the company with the other directors of the company as opposed to being an employee of the company. There was no evidence to show that there had been any degree of control exercised by the company over the applicant such as entitlement to annual leave and fixed work hours. Further, the applicant failed to prove that he wore two hats that of an executive and non-executive director as alleged. The uncontroverted evidence showed that the applicant had participated in the company as a director and shareholder of the company with the other two directors of the company. It could reasonably be inferred that all directors of the company were collectively the mind and will of the company and could not therefore be considered as the employees of the company. The applicant was removed as a director pursuant to an EGM in accordance with the provisions of the company law due to serious allegations relating to breach of his fiduciary duties as a director and this was not a case of dismissal as an employee of the company (see paras 69, 71, 73, 75 & 77).

(4) The applicant's action in bringing the action albeit as a shareholder was inconsistent with his contention that he was an employee of the company as his action was against the best interest of the company ie to wind down the company. Next, there was no domestic inquiry and other due process accorded to the applicant simply because the applicant was not an employee of the company to be accorded such due process. Further, the Industrial Court had ruled that the issue whether the claimant was a workman or not should be dealt with in the process of trial if there was no challenge of the Minister's reference and once the case goes to the Industrial Court. The decision of the company not to appeal and/or file for judicial review against the interim award of the Industrial Court did not bar the ventilation of the said issue in the process of trial at the Industrial Court. Therefore, the learned chairman of the Industrial Court had correctly decided based on a proper evaluation of the totality of evidence that the applicant was not an employee of the company and as such was not a workman of the company within the meaning of a 'workman' as defined under s 2 of the Industrial Relation Act 1967 (see paras 85, 87 & 91–93).

[Bahasa Malaysia summary

Ini adalah permohonan semakan kehakiman yang difailkan oleh pemohon untuk membatalkan award oleh Mahkamah Perusahaan. Responden pertama ('syarikat') adalah entiti sendirian berhad. Pada masa penubuhannya, pemohon, Lim Boon Huat yang merupakan pengarah urusan ('COW1'), dan

Chang Heng Keong ('CHK') adalah ahli pengasas syarikat, pengarah dan pemegang saham. Syarikat mengekalkan daftar pekerja untuk semua pekerjanya yang termasuk nama semua tiga pengarah syarikat. Dengan memasukkan nama-nama semua pengarah dalam daftar pekerja, syarikat telah mencarum kepada Kumpulan Wang Simpanan Pekerja, membayar caruman Pertubuhan Keselamatan Sosial dan potongan cukai bulanan. Melalui notis bertarikh 14 Oktober 2019, COW1 telah memohon untuk mengadakan mesyuarat agung luar biasa ('EGM'). EGM telah diadakan pada 6 November 2019 di mana pemohon dan CHK telah disingkirkan sebagai pengarah syarikat pada hari tersebut dan syarikat melantik anak lelaki COW1 ('Jovi Lim') sebagai pengganti mereka. Pada masa pemecatannya, pemohon memegang jawatan sebagai pengarah dan juga memegang jawatan sebagai pengarah teknikal serta ditugaskan untuk memantau kerja projek di tapak dan memastikan projek disiapkan mengikut spesifikasi dan tempoh yang dikehendaki oleh pelanggan syarikat serta menyelesaikan sebarang isu teknikal semasa pembinaan projek. Kira-kira enam hari selepas pemecatannya, pemohon dan CHK mengeluarkan notis tuntutan undang-undang kepada COW1 dan Jovi Lim untuk menuntut pembelian saham mereka dan untuk memberitahu bahawa mereka telah ditindas sebagai pemegang saham minoriti. Pemohon mendakwa bahawa dia adalah seorang pekerja syarikat dan dilantik sebagai pengarah teknikal dan telah dipecat tanpa sebab atau alasan yang sah daripada pekerjaannya dengan syarikat setelah dipecat sebagai pengarah menurut EGM. Mahkamah Perusahaan memutuskan bahawa pemohon bukanlah seorang pekerja syarikat dan oleh itu tidak boleh menuntut pemecatan yang tidak sah di Mahkamah Perusahaan. Oleh itu, permohonan ini. Pemohon berpendapat, antara lain, bahawa: (a) Borang EA (Borang Cukai) jelas menunjukkan bahawa terdapat perbezaan antara gaji yang diterima oleh pemohon (dalam kapasiti sebagai pekerja) dan yuran pengarah yang diterima; (b) pengerusi Mahkamah Perusahaan telah terkhilaf dari segi undang-undang dengan gagal mempertimbangkan bahawa tiada siasatan domestik dilakukan oleh syarikat; dan (c) kegagalan syarikat untuk mencabar rujukan Menteri pada awal dan penolakan permohonan mengetepikan yang difailkan oleh syarikat di Mahkamah Perusahaan menjadikan hujah syarikat kini bahawa pemohon bukanlah seorang pekerja yang terhalang oleh doktrin res judicata. Pemohon juga telah memulakan prosiding sivil di Mahkamah Tinggi terhadap syarikat berdasarkan tuntutan penindasan minoriti yang memohon relif yang bertujuan untuk penggulungan syarikat.

Diputuskan, menolak permohonan:

(1) Jawatan sebagai pengarah teknikal yang diberikan kepada pemohon bukanlah satu jawatan pekerjaan. Ia hanyalah satu 'gelaran' yang diberikan kepada pemohon untuk memudahkan tugas dan tanggungjawab pemohon berkenaan dengan hal-hal teknikal yang berkaitan dengan projek yang dijalankan oleh syarikat. Oleh itu,

dakwaan pemohon bahawa dia diambil bekerja oleh syarikat dalam jawatan pengarah teknikal sehingga tarikh pemecatannya adalah tidak berasas, tidak dapat diterima dan jelas tidak terbukti berdasarkan keseluruhan keterangan kes. Seterusnya, senarai pemohon sebagai pengarah syarikat dalam daftar pekerja tidak bermakna pemohon adalah seorang pekerja syarikat, kerana COW1 yang merupakan pengarah urusan syarikat juga disenaraikan dalam daftar pekerja dan COW1 menegaskan bahawa dia tidak pernah menjadi pekerja syarikat pada bila-bila masa. Pemohon juga tidak mempunyai surat pekerjaan seperti pekerja lain di syarikat. Tiada kontrak pekerjaan yang ditandatangani antara pemohon dan syarikat untuk menunjukkan bahawa pemohon diambil bekerja oleh syarikat dalam sebarang jawatan pada bila-bila masa seperti yang didakwa oleh pemohon (lihat perenggan 46–47, 49 & 52–53).

(2) Skim caruman berkanun pemohon tidak membuktikan bahawa pemohon adalah seorang pekerja syarikat kerana caruman ini boleh dibuat secara sukarela untuk manfaat semua pengarah syarikat. Borang EA yang menunjukkan bahawa terdapat perbezaan antara gaji yang diterima oleh pemohon (dalam kapasiti sebagai pekerja) dan yuran pengarah yang diterima bukanlah keterangan muktamad pekerjaan. Tiada kontrak pekerjaan yang menyatakan bahawa imbuhan bulanan pengarah adalah gaji pemohon. Seterusnya, akaun yang diaudit oleh syarikat tidak membuktikan secara muktamad bahawa pemohon adalah seorang pekerja syarikat dan perlu dipertimbangkan serta diteliti dengan keseluruhan keterangan kes. Mahkamah Perusahaan telah mengiktiraf bahawa terdapat keterangan yang bertentangan berkenaan dengan baucar pembayaran yang dikemukakan oleh syarikat dan borang berkanun yang dikemukakan kepada jabatan kerajaan dan telah mempertimbangkan semua fakta dan keterangan sebelum membuat kesimpulan bahawa pemohon bukanlah seorang pekerja syarikat dan oleh itu tidak menunjukkan keutamaan seperti yang didakwa oleh pemohon (lihat perenggan 57, 59, 62, 64 & 68).

(3) Pemohon tidak berada dalam kawalan dan penyeliaan syarikat dan lebih bertindak sebagai minda dan otak syarikat bersama pengarah syarikat yang lain berbanding sebagai seorang pekerja syarikat. Tiada keterangan untuk menunjukkan bahawa terdapat sebarang tahap kawalan yang dilaksanakan oleh syarikat ke atas pemohon seperti hak cuti tahunan dan waktu bekerja tetap. Selain itu, pemohon gagal membuktikan bahawa dia memegang dua peranan sebagai pengarah eksekutif dan bukan eksekutif seperti yang didakwa. Keterangan yang tidak ditentang menunjukkan bahawa pemohon turut terlibat dalam syarikat sebagai pengarah dan pemegang saham bersama dua pengarah lain syarikat. Ia boleh disimpulkan secara munasabah bahawa semua pengarah syarikat secara kolektif adalah minda dan kehendak syarikat dan oleh itu tidak

boleh dianggap sebagai pekerja syarikat. Pemohon telah disingkirkan sebagai pengarah menurut EGM mengikut peruntukan undang-undang syarikat kerana dakwaan serius berkaitan dengan pelanggaran tugas fidusiari sebagai pengarah dan ini bukanlah kes pemecatan sebagai pekerja syarikat (lihat perenggan 69, 71, 73, 75 & 77).

(4) Tindakan pemohon memulakan tindakan walaupun sebagai pemegang saham adalah tidak konsisten dengan dakwaannya bahawa dia adalah seorang pekerja syarikat kerana tindakannya adalah bertentangan dengan kepentingan terbaik syarikat, iaitu untuk menggulung syarikat. Selanjutnya, tiada siasatan domestik dan proses lain yang sepatutnya diberikan kepada pemohon semata-mata kerana pemohon bukanlah seorang pekerja syarikat yang berhak untuk menerima proses tersebut. Selain itu, Mahkamah Perusahaan telah memutuskan bahawa isu sama ada pengadu adalah seorang buruh atau tidak perlu ditangani dalam proses perbicaraan jika tiada cabaran terhadap rujukan Menteri dan sebaik sahaja kes tersebut dibawa ke Mahkamah Perusahaan. Keputusan syarikat untuk tidak merayu dan/atau memfailkan semakan kehakiman terhadap award interim Mahkamah Perusahaan tidak menghalang pengutaraan isu berkenaan dalam proses bicara di Mahkamah Perusahaan. Oleh itu, pengerusi Mahkamah Perusahaan yang bijaksana telah membuat keputusan yang betul berdasarkan penilaian yang tepat terhadap keseluruhan keterangan bahawa pemohon bukan seorang pekerja syarikat dan dengan itu bukan pekerja syarikat pengertian 'pekerja' seperti yang ditakrifkan di bawah s 2 Akta Perhubungan Perusahaan 1967 (lihat perenggan 85, 87 & 91–93).]

Cases referred to

Afifi Haji Hassan v Norman Disney & Young Sdn Bhd [2019] 1 MELR 103; [2018] 4 ILR 16, IC (refd)

Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal [2018] 2 MLJ 537; [2018] 3 MLRA 589; [2018] 2 CLJ 513; [2018] 2 MELR 337, FC (refd)

Beh Keong Yu v Fairtrio Marketing Sdn Bhd [2006] 3 ILR 2037, IC (refd)

Chong Kim Sang v Metatrade Sdn Bhd [2004] 3 MLJ 1; [2004] 1 MELR 4; [2004] 1 MLRA 241; [2008] 3 AMR 383; [2004] 2 CLJ 439, CA (refd)

Dato' Seri Dr Ahmad Zahid bin Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v Soo Lina & Ors (for and on behalf of the Sarawak Society For People's Aspiration (SAPA)) [2018] 2 MLJ 738; [2018] 1 MLRA 683; [2018] 6 CLJ 285; [2018] 1 AMR 436, CA (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369; [1995] 2 MLRA 435; [1996] 3 AMR 3693; [1996] 4 CLJ 687, FC (refd)

Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd [1997] 2 MLJ 685; [1997] 1 MELR 10; [1997] 1 MLRA 372; [1997] 3 CLJ 777, SC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan [1999] 3 MLJ 1; [1999] 1 MLRA 336; [1999] 3 CLJ 65; [1999] 3 AMR 3529, FC (refd)
Mohd Firdaus Abdullah v Hup Aik Wood Products Sdn Bhd [2012] 4 ILR 355, IC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)
Rajathurai a/l Suppiah v Starship Agencies Sdn Bhd [2015] MLJU 79; [2015] 6 MLRH 216, HC (distd)
William Jacks & Co (M) Sdn Bhd v S Balasingam [2000] 7 MLJ 1; [1996] 2 MLRA 678; [1997] 3 AMR 2585; [1996] 1 MELR 312; [1997] 3 CLJ 235, CA (refd)

Legislation referred to

Industrial Relations Act 1967 s 2
Rules of Court 2012 O 53

Gavin Jayapal (with Kausalyaa Munesbaran and Justin Faun) (Gavin Jayapal) for the applicant.
Mathews George (Mathews George & Co) for the first respondent.

Ahmad Kamal J:

INTRODUCTION

[1] This is an application ('JR 562') filed by the applicant, Woon Kim Choy for judicial review (encl 7) under O 53 of the Rules of Court 2012 ('the ROC') to quash the Award No 1755 of 2022 of the Industrial Court. The award had held that the applicant was not an employee of the company and cannot therefore claim for unlawful dismissal at the Industrial Court.

[2] The applicant is seeking the following reliefs:

(a) a certiorari order to quash the whole decision of the Industrial Court as contained in Award No 1755 of 2022 dated 9 August 2022;

(b) a declaration and order that the first respondent shall pay all just and equitable compensation to the applicant, as ordered by this honourable court;

(c) costs of and/or incidental to this application be costs in the cause; and

(d) such other and/or further reliefs as this honourable court deems fit and proper in the circumstances.

[3] The applicant's case was heard together with another case involving another Director of the company (Chang Heng Keong) at the Industrial

Court, who is the applicant in Judicial Review Application No WA-25–563–11 of 2022 ('JR 563'). A

[4] The instant case (JR 562) are fixed to be heard together with JR 563 at the request of the parties as the dismissal of both the applicant and Chang Heng Keong arose from identical facts and sequence of events. B

[5] After the hearing, I dismissed the applicant's application (JR 562) (encl 7) and Chang Heng Keong's application in JR 563 respectively.

C

[6] This judgment contains the full reasons for my decision in this case (JR 562). Since both JR 562 and JR 563 had not been consolidated but only heard together, this Court will prepare separate grounds of judgment for JR 563.

BACKGROUND FACTS D

[7] The narration of the background facts of the case can be found in the learned chairman of the Industrial Court award and reproduced below with suitable modifications.

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[8] The first respondent ('company') is a private limited entity involved in the business of installation and maintenance of fire lighting systems, trenchless technology and transportation and was established on or about 15 October 1996. At the time of its establishment the applicant, Lim Boon Huat who is the Managing Director (COW1), and Chang Heng Keong were the founding members of the company, its directors and the shareholders. F

[9] Prior to the applicant's removal as the director of the company, as at 31 December 2018, the number of ordinary shares of RM1 each held by the applicant, COW1 and Chang Heng Keong are as follows: COW1 held 100,000 shares, the applicant held 90,000 shares and Chang Heng Keong held 25,000 shares. By 6 November 2019 the company held an issued share capital of 250,000 ordinary shares wherein 25,000 of the shares were held by the applicant, Chang Heng Keong held 90,000 shares. 100,000 shares were owned by COW1 and COW1's son Jovi Lim Zhi Wei ('Jovi Lim') held 35,000 shares. G H

[10] The company maintained the register of employees for all its employees which included the names of all the three directors of the company. By the inclusion of all the directors' names in the Register of Employees, the company had contributed towards Employees Provident Fund ('EPF'), paid Social Security Organisation ('SOCSO') contributions and PCB deductions. In the Register of Employees, the monthly earnings of the applicant, Chang Heng Keong and COW1 without doubt were listed as their monthly salaries a copy of which is exhibited at p 18 CLB 1. I

[11] By a notice dated 14 October 2019, COW1 had requisitioned for an Extra General Meeting ('EGM), resolving to remove the applicant and Chang Heng Keong as the directors of the company with immediate effect and to appoint Jovi Lim as the new director of the company.

[12] The EGM was convened on 6 November 2019 wherein the applicant, attended the meeting earlier with his proxy Woon Wei Fan ('CLW1') and shortly after it was convened, the applicant walked out of the meeting. The applicant and Chang Heng Keong were removed as Directors of the company on that day and the company appointed Jovi Lim in their stead.

[13] At the time of his dismissal, the applicant held the position of Director and in addition, held the position of a Technical Director and was tasked with onsite monitoring of the project works and to ensure the project to be completed within the specification and time frame required by the company's customers and to resolve any technical issue during the construction of the project. His last drawn salary was RM14,500 with a fixed monthly allowance of RM4,500 and purportedly received other allowances. The applicant was given a company's car to use for his personal and business related matter.

[14] Approximately six days after his removal, the applicant and Chang Heng Keong issued a legal notice of demand to COW1 and Jovi Lim to demand for a buyout of their shares and to notify that they had been oppressed as minority shareholders.

[15] The applicant claimed that he was an employee of the company and was employed as a Technical Director and had been dismissed without just cause or excuse from his employment with the company upon his removal as a Director pursuant to an EGM held on 6 November 2019.

[16] The Industrial Court held that the applicant was not an employee of the company and cannot therefore claim for unlawful dismissal at the Industrial Court.

[17] Hence, the present judicial review application by the applicant.

THE GROUNDS FOR JUDICIAL REVIEW

[18] Based on the statement, the applicant seeks to challenge the decision of the Industrial Court on the ground that the learned chairman of the Industrial Court erred in law in reaching his finding for the following reasons:

(a) failure to consider that there was no domestic inquiry conducted by the company;

(b) the failure to consider that the applicant was denied due process;

(c) the chairman concluded that the applicant does not fall within the definition of a 'workman' as defined under s 2 of the Industrial Relations Act 1967 ('the IRA') although there were EPF contributions made in the applicant's favour. The chairman failed to consider that the most telling feature to distinguish an employee apart from a director/shareholder is the fact that the individual (applicant) was in fact receiving EPF and other statutory contributions;

(d) the chairman of the Industrial Court had failed to consider the fact that the company had not appealed the dismissal of the striking out Application. The fact that the same was not appealed constitutes an issue of res judicata and this was not considered by the chairman of the Industrial Court; and

(e) the chairman of the Industrial Court did not consider that the company should have sought judicial review of the Minister's reference, that is to have the Minister's reference quashed. The fact that the company did not avail of this option raises the issue of res judicata.

[19] The chairman of the Industrial Court in failing to consider that there was no domestic inquiry and/or due process has come to an unfair/unreasonable finding. In this regard:

(a) the removal of the applicant as a Director and the unlawful dismissal termination as an employee was done unilaterally; and

(b) the applicant never received any warning and/or show cause letters.

[20] Thus, in dismissing the claim herein, the chairman of the Industrial Court did not consider the applicant's contributions towards the company.

[21] In deciding that the applicant does not fall within the definition of a workman, the chairman of the Industrial Court is deemed to have erred as evidence is clear that the applicant is in fact an employee. In this regard:

(a) throughout the tenure of the applicant's employment, the applicant had received a monthly salary together with allowances;

(b) the company had also made all relevant statutory contributions on behalf of the applicant namely EPF, SOCSO and PCB; and

(c) the monthly salary of the applicant is stated in the register of employees.

[22] Premised on the above, as it is undisputed that the company had made all relevant statutory contributions on behalf of the applicant, it is crystal clear that the applicant is in fact an employee of the company.

[23] Although receiving salary and making contributions and deductions are not the sole criteria in deciding whether the applicant was an employee of the company, it is the most telling one and this was not appreciated by the chairman of the Industrial Court in coming to his finding.

[24] Further, from a perusal of the company's financial report, it is also pertinent to note that the directors have been classified as employees.

[25] The company had not provided any proof that a resolution was passed at a general meeting with regard to the remuneration of directors as per article 76 of the company's Articles of Association.

[26] From the lack of evidence on such general meeting being held and any resolutions passed pertaining to the subject of the director's remuneration, this enforces the fact that the applicant was in fact, receiving a salary instead of a remuneration.

CONTENTION OF PARTIES

[27] The applicant's case can be summarised as follows:

(a) the applicant was an employee who was a director and held the position of Technical Director and had been dismissed without just cause or excuse from his employment with the company upon his removal as a Director pursuant to an EGM held on 6 November 2019; and

(b) the applicant argued that all evidence that had been adduced in the trial shows that the applicant was an employee of the company and was employed as a Technical Director and received a monthly salary.

[28] The company's case can be summarised as follows:

(a) the company denies that the applicant was an employee of the company and was not at any material time a 'workman' within the definition of s 2 of the IRA;

(b) the company maintains that the applicant was a director and the shareholder of the company and had participated and carried out the affairs of the company in his capacity as a director together with the other two directors; and

(c) the company claimed that the applicant was merely a director with a title to facilitate his role in the company and had no concern with being an employee of the company.

THE LAW

[29] Judicial review is generally concerned with the decision-making process where the impugned decision is flawed on the ground of procedural impropriety.

[30] However, the law has now developed to allow a decision to be challenged on grounds of illegality and irrationality, which then permits the courts to scrutinise the decision not only for the process, but also for substance.

[31] It is settled law that the High Court will not interfere with a decision of the Industrial Court unless it can be established that the decision is infected with errors of law.

[32] In the Federal Court case of *Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal* [2018] 2 MLJ 537; [2018] 3 MLRA 589; [2018] 2 CLJ 513; [2018] 2 MELR 337, the liberal approach on judicial review in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 has been re-emphasised as follows:

> [45] In the same appeal, Edgar Joseph Jr FCJ (Eusoff Chin in agreement) said that an award could be reviewed for substance as well as for process:
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> > It is often said that judicial review is concerned not with the decision but the decision-making process (see eg *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.
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> > But Lord Diplock's other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that *such a decision is also open a challenge on grounds of 'illegality' and irrationality' and in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance.*
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> > In this context, it is useful to note how Lord Diplock (at pp 410-411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality and (iii) procedural impropriety. This is how he put it:
> >
> > > *By 'illegality'* as a ground for Judicial Review, I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
> > >
> > > *By 'irrationality'*, I mean what can by now be succinctly referred to as

'Wednesday unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp.* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.

I have described the third head as *'procedural impropriety'* rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

Lord Diplock also mentioned *'proportionality'* as a possible fourth ground of review which called for development. (Emphasis added.)

[33] Further, the Court of Appeal in *Dato' Seri Dr Ahmad Zahid bin Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v Soo Lina & Ors (for and on behalf of the Sarawak Society For People's Aspiration (SAPA))* [2018] 2 MLJ 738; [2018] 1 MLRA 683; [2018] 6 CLJ 285; [2018] 1 AMR 436 explained the test of reasonableness in a judicial review as follows:

[39] The test of reasonableness has been the subject of many cases over the decades in other Commonwealth jurisdictions. For example, in dealing with the circumstances under which the court could intervene to quash the decision of an administrative officer or tribunal on ground of unreasonableness or irrationality, Henchy J of the Irish Court in The State (at the Prosecution of *John Keegan and Eoin J Lysaght) v The Stardust Victims' Compensation Tribunal* [1986] IR 642 set a number of such circumstances in different terms. They are:

1. It is fundamentally at variance with reason and common sense;
2. It is indefensible for hearing in the teeth of plain reason and common sense; and
3. Because the court is satisfied that the decision-maker has breached his obligation whereby he 'must not flagrantly reject or disregard fundamental reason common sense in reaching his decision.

[41] In *Meadows v Minister for Justice Equality and Law Reform and others* [2010] IESC 3 Denham J in her dicta (ratio) set out the following test:

> This test includes the implied constitutional limitation of jurisdiction of all decision-making which affects rights and duties. Inter alia, the decisionmaker should not disregard fundamental reason or common sense in reaching his or her decision. The constitutional limitation of jurisdiction arises inter alia from the duty of the courts to protect constitutional rights. When a decision-maker makes a decision which affects rights then, or reviewing the reasonableness of the decision; (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on or rational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective.

[34] In addition, a decision that involves an error of law is subject to judicial review as explained by the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1; [1999] 1 MLRA 336; [1999] 3 CLJ 65; [1999] 3 AMR 3529, where it states:

> In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the 'not to be challenged, etc' kind, *judicial review will lie to impeach all errors of law made by an administrative body or tribunal and*, we would add, inferior courts. In the words of Lord Denning in *Pearlman v Harrow School* (ibid) at p 70, *'... no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it'.* (Emphasis added.)

[35] Based on the foregoing passages, it is my view that to succeed in an application for judicial review, the applicant must show that the Industrial Court had, among others:

(a) asked itself the wrong questions;

(b) considered irrelevant matters;

(c) failed to take relevant matters into consideration;

(d) failed to apply the proper principle(s) of law; and/or

(e) reached a decision that was so perverse that no reasonable tribunal under similar circumstances would have reached it.

THE DECISION OF THE COURT

Whether the chairman of the Industrial Court erred in law when it held that the applicant was not an employee and not a workman of the company within the meaning of a 'workman' as defined under s 2 of the IRA?

[36] To determine whether the applicant was or was not a workman of the company, this court has to examine the evidence produced before this court as a whole in accordance with the IRA and the established principles.

[37] Therefore, it is necessary for this court to consider and determine whether the applicant was a workman under the IRA before this court considers whether the applicant was dismissed without just cause or excuse.

[38] The meaning of a workman is defined in s 2 of the IRA as:

> ... any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and, for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to a dispute.

[39] The definition of s 2 of the IRA is not complete without referring to the phrase 'contract of employment' as defined in this section:

> Any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman.

[40] To determine whether the applicant is a workman, the Federal Court in the case of *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369; [1995] 2 MLRA 435; [1996] 3 AMR 3693; [1996] 4 CLJ 687 adopted which is now accepted as the correct test to be applied that states:

> ... In all cases where it becomes necessary to determine whether a contract is one of service or for service, the degree of control which an employer exercises over a claimant is an important factor although it may not be the sole criterion. The terms of the contract between the parties must, therefore first be ascertained. Where this is in writing, the task is to interpret its terms in order to determine the nature of the latter's duties and functions. Where it is not then its term must be established and construed ...
>
> ... But in the vast majority of cases there are facts which go to show the nature, degree and extent of control. These include, but are not confined, to the conduct of the parties at all relevant time. Their determination is a question of fact. When all the features of the engagement have been identified, it becomes necessary to determine whether the contract falls into one category or the other, that is to say, whether it is a contract of service or contract for service ...

[41] In the case of *Chong Kim Sang v Metatrade Sdn Bhd* [2004] 3 MLJ 1; [2004] 1 MELR 4; [2004] 1 MLRA 241; [2008] 3 AMR 383; [2004] 2 CLJ 439 the Court of Appeal in deciding that the applicant was a workman stated that:

> The relationship of employer and employee exists where a worker is employed under a contract of employment, ie contract of service. According to the *Concise Oxford Dictionary* (9th Ed), an 'employee' is 'a person employed for wages or salary'. A person who is appointed director of a company does not become an employee of the company. Whether he is entitled to receive remuneration as a director would depend on the articles of associations and that would normally have to be determined by the company in a general meeting. An employee of a company can of course be appointed a director of that company. He remains an employee of the company as long as his contract of employment has not been terminated and would still be entitled to receive wages or salary ...

[42] Therefore, based on the above, the court is of the view that in order to determine whether one is a workman or not under the IRA, it is pertinent to consider all relevant factors and circumstances including whether he is engaged under a contract of service or for services, the nature, degree and extend of control which an employer exercises over an employee, his functions and duties, the conduct of the parties, the intention of the parties at the relevant time and all other features of engagement defining and governing the relationship between the employer and employee.

[43] The nature, degree and extent of control on an employee including the conduct of the employer and employee at all material times is a question of fact and the facts to its determination must be to establish that there was a contract of employment ie contract of service in existence.

[44] The applicant claimed that he was an employee of the company based on the following:

(a) the applicant has been continuously in the employ of the company. He was employed as its Technical Director, alongside two other directors, Lim Boon Huat and Chang Heng Keong;

(b) the engagement of the applicant as a director of the company was listed on the register of employees.

(c) at all material times, the company made all relevant statutory contributions, namely to EPF, SOCSO and monthly tax deductions to the Inland Revenue Board to the applicant;

(d) the company issued a yearly EA Form to the applicant. The EA clearly distinguished between the applicant's salary and the director's fees;

(e) in his time with the company, the applicant wore two 'hats', wherein he was a Technical Director (employee) and a Director (as per the CCM searches);

(f) the applicant was simultaneously employed as a Technical Director (employee) while being a board of directors;

(g) the applicant participated in decision-making through mutual understanding and agreement with Lim Boon Huat and Chang Heng Keong;

(h) all decision-making for the company was brought about through mutual agreement and approval of other directors. There were no unilateral decisions were made about the company without prior consultation;

(i) the applicant was reliant on all salaries and allowances obtained; and

(j) during the applicant's tenure with the company, Chang Heng Keong and the applicant had secured the majority of contracts that were awarded to the company.

[45] Having perused the evidence produced before the court, I am of the view the applicant was a director and a shareholder of the company and was not a workman or employee of the company to bring a claim for unlawful dismissal against the company.

Technical director

[46] The applicant had negotiated major contracts for the company in his capacity as a Director of the company. The applicant was removed as a Director of the company pursuant to an EGM held on 6 November 2019. The designation as Technical Director given to the applicant was not a position of employment. It was merely a 'title' given to the applicant to facilitate the applicant's task and responsibilities in respect of technical matters pertaining to the projects undertaken by the company.

[47] Therefore, I find that the applicant's claim that he was employed by the company in the position of Technical Director until the date of his dismissal on 6 November 2019 are without basis, untenable and clearly unproven based on the totality of evidence of this case.

[48] The learned chairman of the Industrial Court in his award held as follows:

> [59] The claimant held the position of Technical Director in the company. COW1 claimed that the *title Technical Director for the claimant was for the claimant to represent the company when dealing with the top echelon in sourcing for projects. CHK, in his cross examination, agreed that the title project manager was merely a title associated with his name for him to carry out his duty to the company and further agreed that the technical director title of the claimant, was because the claimant was in charge of technical matters in the company.*
>
> [64] *Despite having the title as a technical director and playing his role in securing the projects for the company, without considering the nature, degree and extent of control on*

> *the claimant including the conduct of the claimant and the company, the employee-employer relationship cannot be assumed to be existed by the mere fact that the claimant is labelled as such and there was contribution towards EPF and SOCSO.* The terms of the contract between the parties must be first ascertained which in this case it is without a written contract of employment. (Emphasis added.)

Register of employees

[49] On the issue of the listing of the applicant as a Director of the company in the said register of employees I am of the view that it could not mean that the applicant was an employee of the company as COW1 (Lim Boon Huat) who was the company sole witness in the Industrial Court and the Managing Director of the company was also listed on the register of employees and COW1 had maintained that he was never an employee of the company at any time.

[50] On this issue, the learned chairman had stated as follows:

> [56] COW1, in his evidence stated that it was not only the Claimant's salary particulars that was included in the register of employees, but his including which he claimed does not conclude that the Claimant was paid salary.

[51] Based on the above, it is my view that the applicant's name appearing in the company's register of employees therefore could not mean that the applicant was an employee of the company as all the company's directors names were included in the said register of employees including COW1 (Lim Boon Huat).

Letter of employment

[52] The applicant in the instant case did not have a letter of employment like other employees of the company as follows:

(a) letter of employment of Mr Tan Hock Lye dated 17 January 2008 (pipe jacking supervisor) (see: pp 701–702 *afidavit sokongan)*;

(b) letter of employment of Mr Edwin Wong Zi Heng dated 1 November 2018 (project engineer) (see: pp 703–704 *afidavit sokongan*); and

(c) letter of employment of Ms Chong Kwee Swee dated 2 May 1997 (general clerk) (see: pp 705–706 *afidavit sokongan*).

[53] There was no contract of employment signed between the applicant and the company to show that the applicant was employed by the company in any position at any time as alleged by the applicant.

[54] The applicant also did not have a job scope or job designation in the company and essentially was free to 'work' in the company as he pleased.

[55] The learned chairman of the Industrial Court in his award held as follows:

> [47] In this instant case, *there was no written contract of employment or letter* of employment which in the court's view would provide the best evidence of the relationship between the company and the claimant.
>
> [49] *Having a contract of employment documented would definitely assist the court in ascertaining the exact and actual relationship the claimant had with the company, whether or not he is a workman, although it is not the criteria in determining his status.*
>
> [51] Nevertheless, *in the absence of a documented contract of employment, the claimant must prove to this court that there exist an oral contract which will show existence of implied terms of employment that he is a workman and was serving his employer as a workman.* (Emphasis added.)

Contributions of EPF/SOCSO/PCB

[56] Further, I am of the considered opinion that the applicant's statutory contributions such as EPF, SOCSO and PCB could not mean that the applicant was an employee of the company simply because all the directors of the company including COW1 made similar statutory contributions on a voluntary basis.

[57] I find that there was an unchallenged testimony by COW1 at the Industrial Court, the said contributions were benefits given to the Directors of the company in their capacity as directors and not as employees of the company. Further, I am of the view that the scheme of these statutory contribution does not per se establish that the applicant was an employee of the company as these contributions can be made on a voluntarily basis as in this case for the benefits of all directors of the company.

[58] The applicant has also contended that the EA Form (Tax Form) clearly showed that there was a distinction between the salaries (*gaji*) received by the applicant (in his capacity as an employee) and the directors' fees received to support the alleged employment of the applicant.

[59] However, I am of the view that the said EA Forms are not conclusive evidence of employment. In any event, the EA Form referred to by the applicant in his submission is for the year ending 2016. However, if the EA Forms for 2013, 2014 and 2015 are to be perused, the basic salary and directors' fees are lumped up and there was no distinction for example the following EA Form 2015.

[60] Even if there are such a distinction, it is my view that this cannot by itself proved that the applicant was an employee of the company and the said EA Forms has to be considered with the totally evidence of the case, to ascertain if the applicant was employed by the company.

[61] The learned chairman of the Industrial Court in his award has stated as follows:

> [52] *The thrust of the claimant's contention emanates from the register of employees exhibited at (p 18 CLB 1) that reveals that the claimant was paid monthly salary and the company had contributed for the claimant's EPF and SOCSO, the financial statements that had categorised all the directors' earnings under the hearing 'employees benefits'* and his role and job scope which was to monitor the actual works carried out until its completion and to resolve technical issues of the project.
>
> [54] In this situation, it is the c*ourt's view that having regard to the EPF contribution made in the claimant's favour would not reduce the claimant's position into that of an employee.*
>
> [55] Besides the contemporaneous documents mentioned above, which the claimant relied upon to show that the claimant had received salary and made the statutory contributions and deductions to support his contention that he was an employee of the company, there were the other contemporaneous documents such as the payment vouchers that were relied on by the company which shows that the monthly earnings were in fact the director's remuneration which made no reference to 'salary' and this was exhibited at pp 17–27 CLB 1A for the year 2019. *This piece of evidence was not challenged by the claimant and no explanation was advanced as to why the payment vouchers had referred to the monthly payments as remuneration and not salary. In view of the conflicting evidence between the contents in the payment Vouchers and the register of employees, the court cannot solely rely on any of these documents due to their conflicting nature and deductions is not the sole criteria in deciding whether the claimant was an employee of the company.* (Emphasis added.)

(See: *Beh Keong Yu v Fairtrio Marketing Sdn Bhd* [2006] 3 ILR 2037; and *Mohd Firdaus Abdullah v Hup Aik Wood Products Sdn Bhd* [2012] 4 ILR 355.)

Director's remuneration

[62] Based on the evidence produced before this court, the applicant was paid monthly director's remuneration as clearly stated in the payment Vouchers tendered in the Industrial Court. There was also no employment contract to state that the said monthly payment were the applicant's salary as alleged by the applicant in this case.

Audited accounts

[63] The applicant has also further contended that the audited accounts of

the company supported his contention that he was an employee, based on each and every audited account for all financial years.

[64] However, I view that the said audited accounts does not conclusively prove that the applicant was an employee of the company and has to be considered and scrutinised with the overall evidence of the case.

[65] The learned industrial chairman had therefore correctly concluded about the audited accounts as follows in his award:

> [57] The financial statements of the company at p 236 CLB 1A was further referred to by the claimant and was submitted that the financial statement was another supporting evidence that shows the claimant was an employee of the company. *To me, the financial statement argument cannot be taken to suggest that the claimant was an employee of the company for the simple fact that the remuneration of COW1 as the managing director and the majority shareholder was combined under the same heading of 'employee benefits'. If for these reason alone, the claimant is to be accepted as an employee of the company, the same may be concluded for COW1 since all financial related documents ie the register of employees, financial statements and statutory contributions that were made, were exercised by all the three directors of the company and none of the director of the company had a different pattern. This would bring us to an unjustifiable conclusion that all the three directors of the company were employees which then brings us to the question to whom had they reported to.*
>
> [58] As stated earlier, *the terms 'salary' or 'remuneration' used interchangeably in different documents and the statutory contributions made cannot determine the issue at hand solely and the court is required to consider various other factors as had been emphasised in the authorities mentioned above.*(Emphasis added.)

[66] The case of *Rajathurai a/l Suppiah v Starship Agencies Sdn Bhd* [2015] MLJU 79; [2015] 6 MLRH 216 referred by the applicant can be distinguished as follows:

(a) the plaintiff in *Rajathurai* exhibited a letter of appointment. there was no such letter of employment in the instant case;

(b) the statutory payments in *Rajathurai* were scrutinised to determine the true employer of the plaintiff;

(c) there were documentary evidence such as email trails proving the contractual arrangement of the parties and email correspondence stating the plaintiff's salaries will be paid by the defendant. There was no such evidence from the COW1 and/or the company; and

(d) *Rajathurai* was a case where the plaintiff's claim was based on contract law not a case of unfair dismissal under the IRA.

Payment vouchers

[67] The applicant has also disputed the basis for the Industrial Court's preference of the payment vouchers that were tendered by the company over the statutory forms that were lodged with the Governmental departments.

[68] I view that the Industrial Court had recognised that there was conflicting evidence with regard to the payment vouchers and the statutory forms and had gone on to consider all the facts and evidence before concluding that the applicant was not an employee of the company and as such did not show preference in the manner contended by the applicant.

Control and/or supervision of the company

[69] Further, I view that the applicant had not been in the control and supervision of the company and acted more as the mind and brain of the company with the other directors of the company as opposed to being an employee of the company. There was no evidence to show that there has been any degree of control exercised by the company over the applicant such as entitlement to annual leave and fixed work hours.

[70] The learned chairman of the Industrial Court had stated:

> [67] There is *no evidence* to show that the *claimant, who claimed to be an employee of the company had a superior to report to, as in this case to COW1, or that he had to adhere to the instructions of the company in carrying out his role as a Technical Director. Neither was there any evidence that shows that there was control exercised over the claimant in regard to his discharge of duty.* In conclusion, t*he claimant never had a line of reporting, was never supervised by the company and had worked independently and therefore, it could not be said there is an existence of an employee-employer relationship between the company and the claimant.* (Emphasis added.)

Two hats

[71] Further, I find the applicant failed to prove that he wore two hats that of an executive and non-executive director as alleged by the applicant. If the applicant's contention is allowed, could result in many cases being filed in the Industrial Courts involving 'Working' Directors claiming unlawful dismissal in Malaysia.

[72] Furthermore, I find that this issue was only raised during the trial at the Industrial Court and was not pleaded in the statement of case.

Participation in the daily operation and/or management of the company

[73] This court finds that the uncontroverted evidence showed that the applicant had participated in the company as a director and shareholder of the

company with the other two directors of the company. This was also the pertinent and crucial finding of the learned Industrial Court chairman.

[74] It is also important to consider the following admission of the applicant in the Industrial Court:

(a) that Lim Boon Huat (COW1), Chang Heng Keong (the applicant in Suit 563) and the applicant had known each other for a period of approximately 30 years;

(b) that all decision-making process for the company was brought about through mutual agreements and approvals of Lim Boon Huat, Chang Heng Keong and the applicant; and

(c) that no unilateral decisions were made with regards to the company without the prior consultation between Lim Boon Huat, Chang Heng Keong and the applicant.

[75] Given the above admission, this court is of the view that it can reasonably be inferred that all directors of the company namely Lim Boon Huat (COW1), Chang Heng Keong and the applicant were collectively the mind and will of the company and cannot therefore be considered as the employees of the company.

[76] The learned chairman of the Industrial Court in his award has stated the following:

> [68] *From the facts adduced, there have been an extensive role played by the claimant as the founding member of the company, director and shareholder of the company. Whilst the claimant had performed some executive functions, there was no evidence of him being answerable to anyone else except the board of directors though no evidence was adduced on this point*. As a director, the claimant attended the board of directors' meetings, involved in decision making which required the agreement of all the three directors joined signatory of the company's financial statements and documents, executed contracts that involved multiple quotations and purchase orders. *The fact that the claimant was the signatory of the company's contracts with its customers, makes it difficult to fathom that he could still be an employee of the company. All this factors itself is sufficient to prove that he was not an employee of the company.*
>
> [69] What is pertinent to note is that the claimant's extensive role in the company's decision making process from its inception wherein by his own evidence, the claimant claimed that from the time the company was established, the claimant COW1 and CHK would collectively make decisions and no unilateral decisions were made without prior consultation between the three of them. And *the claimant further stated that all decision-making for the company was brought-about through mutual agreement between them. To me, it is an acknowledgement by the claimant himself that he was collectively the directing minds and brains of the company.* (Emphasis added.)

Removal of the applicant as a director pursuant to the EGM

[77] From the evidence produced before the court, I find that the applicant was removed as a director pursuant to an EGM in accordance with the provisions of the Company Law due to serious allegations relating to breach of his fiduciary duties as a director and this was not a case of dismissal as an employee of the company.

[78] COW1, had clearly in cross-examination explained the reasons for the removal of the applicant as Director of the company at the EGM on 6 November 2019 (see: pp 159–163 *afidavit jawapan responden pertama*).

[79] COW1 further testified pertinently in re-examination that when the applicant was removed as a Director he did not claim that he was an employee of the company during the said EGM and vide his solicitors letter sent shortly after his removal as a director of the company (see: pp 181–184 *afidavit jawapan responden pertama*).

[80] I am of the view that if the applicant was indeed an employee of the company as he now alleges, the applicant would have raised the issue of his dismissal at the earliest opportunity in the said legal notice of his solicitors. As such his failure to raise the issue of his dismissal must cast serious doubts on his assertion that he was also an employee of the company since 1997.

[81] The learned Industrial Court chairman had also considered the applicant's failure to raise the said issue of his termination as an employee at the material time as follows:

> [74] Another point to note in regards to the legal notice issued by the claimant and CHK to COW1 and Jovi Lim is that *despite the issues raised in the said notice pertain to minority oppression and the demand to buy out the shares, the claimant did not raise the issue of his termination.* (Emphasis added.)

[82] Given the above, it is my view that the applicant was not an employee of the company and the applicant's claim was merely an afterthought and lacking bona fide and only arose after the applicant was removed as a Director of the company pursuant to the EGM on 6 November 2019.

Johor Bahru/Muar civil suit

[83] It is to be noted that the applicant had also commenced civil proceedings at the Johor Bahru High Court Originating Summons No JA-24NCC-7–03 of 2020 against the company for reliefs based on a minority oppression claim. The said proceedings has been transferred to the High Court at Muar and awaiting trial (see: pp 385–440 *afidavit sokongan*).

[84] The applicant's action in commencing civil proceedings in the High Court against the company and the other Directors of the company albeit in his capacity as a shareholder was based on the same facts as the case in the Industrial Court and seeking reliefs aimed at winding up of the company, clearly were acts inconsistent with his purported employment and was prejudicial to the interest of the company.

[85] I am of the considered view that the applicant's action in bringing the said action albeit as a shareholder was inconsistent with his contention that he was an employee of the company as his action was against the best interest of the company, (ie to wind down the company).

(See: *Afifi Haji Hassan v Norman Disney & Young Sdn Bhd* [2019] 1 MELR 103; [2018] 4 ILR 16.)

Domestic inquiry

[86] The applicant claimed that the chairman of the Industrial Court erred in law by failing to consider that no domestic inquiry was conducted by the company.

[87] I am not surprised that there was no domestic inquiry and other due process accorded to the applicant simply because the applicant was not an employee of the company to be accorded such due process.

[88] On this issue, I find that the learned chairman of the Industrial Court has made the following findings:

> [76] Having found that the claimant had failed to prove that he had been a workman or was never a workman, *the issue of whether the claimant was dismissed with just cause or excuse is irrelevant because there was no issue of dismissal of a workman in the first place. It is this court's view that no further deliberation on whether he had been unfairly dismissed without just cause or excuse is required at this point.* (Emphasis added.)

Res judicata

[89] The applicant has also contended that the company's failure to challenge the Minister's reference at the outset and the subsequent dismissal of the striking out application filed by the company at the Industrial Court made the company contention now that the applicant was not a workman barred by the doctrine of res judicata.

[90] It is clear in the interim award of the Industrial Court that the merits of the case (ie whether the claimant was a workman) was not heard as the

Industrial Court had correctly concluded that once a Minister makes a reference, the party seeking to challenge it must do so by seeking to quash by certiorari the reference and where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to its conclusion and in the process deal with the question whether the claimant is a workman or not.

[91] Clearly, the Industrial Court had ruled that the issue whether the claimant is a workman or not should be dealt with in the process of trial if there was no challenge of the Minister's reference and once the case goes to the Industrial Court.

[92] I am of the view that the decision of the company not to appeal and/or file for judicial review against the interim award of the Industrial Court does not bar the ventilation of the said issue in the process of trial at the Industrial Court as done in this case by the learned Industrial Court chairman.

(See: *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685; [1997] 1 MELR 10; [1997] 1 MLRA 372; [1997] 3 CLJ 777.)

Evaluation of evidence

[93] Having perused the evidence produced before the court, I am of the view that the learned chairman of the Industrial Court had correctly decided based on a proper evaluation of the totality of evidence that the applicant was not an employee of the company and as such was not a workman of the company within the meaning of a 'workman' as defined under s 2 of the IRA.

[94] The learned Industrial Court chairman had correctly considered all the evidence and facts and concluded as follows:

> [75] Premised on all the above evidence and facts, the claimant had failed to prove that he had been under a contract of service with the company. *The evidence and contemporaneous documents tendered in the trial, had instead pointed to him being under a contract for service with the company.*
>
> [78] For the above reasons, *the claimant was a Director and shareholder of the company and not an employee*. The conduct of all parties at all relevant times shows that *the claimant collectively was the directing mind and brain of the company and worked independently and with no supportive evidence that he was even answerable to the board of directors.* (Emphasis added.)

[95] The learned chairman of the Industrial Court has heard the evidence and made a finding that the applicant had failed to discharge the onus of proving that he was an employee of the company and had accepted the version that the applicant was a Director and shareholder of the company.

[96] Based on the findings of the learned chairman above, it clearly shows that he had assessed all the facts and documents tendered before him and concluded that the applicant was not an employee of the company.

[97] Further, I am of the view the learned chairman being faced with two conflicting versions of facts is entitled to ascertain which version was more probable and arrive at a specific finding of fact.

[98] The learned chairman has all the relevant and contemporaneous documents ie witnesses' statements etc to draw a reasonable inference from them.

[99] Therefore, I am of the opinion that the learned chairman is entitled to affirm which of the two stories is the true version because the learned chairman had the opportunity of seeing and hearing the witness and had the opportunity to see the demeanor of the witness and accepted the evidence adduced by the company as credible.

[100] The finding of facts of the Industrial Court will only be disturbed by this court when the learned chairman was wrong in the evaluation of the evidence. It is for the applicant to establish that there was a misdirection by the learned chairman to warrant interference by this court. Unfortunately, the applicant has not demonstrated any such errors in the facts of this case to warrant appellate interference.

[101] I view the learned chairman's findings as rational and cogent and there are no flaws in its reasoning or the conclusions therein. Based on the evidence before the Industrial Court, it cannot be said that the findings of the learned chairman are irrational or perverse.

[102] It is evident from the above, that the applicant's complaints concerning the award are largely premised on findings of fact by the Industrial Court. It is trite that this court sitting in a supervisory capacity will not interfere with the findings of the Industrial Court, more so when these findings relate to findings of credibility and evaluation of documentary and oral testimony, which are matters which fall wholly within the purview of the functions of the Industrial Court.

[103] The Court of Appeal in *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1; [1996] 2 MLRA 678; [1997] 3 AMR 2585; [1996] 1 MELR 312; [1997] 3 CLJ 235 held that a court cannot utilise certiorari proceedings as a cloak to entertain an appeal against findings of fact. The Court of Appeal in its judgment further held as follows:

> The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it. However widely understood the proposition in *Rama Chandran* and *Amanah Butler* may be, it does not include the review, in certiorari proceedings, of *findings of fact* based on the credibility of witnesses. (Emphasis added.)

[104] I am of the view that the finding of the learned chairman is based on the totality of the evidence adduced before him. To me, the learned chairman had scrutinised the evidence of both parties and applied the law to the facts and made a reasonable conclusion. It is not the task of this court to scrutinise every piece of evidence adduced before the Industrial Court and to make another finding of fact. That task of fact-finding fall within the jurisdiction of the Industrial Court.

CONCLUSION

[105] Premised on the aforesaid reasons, I am of the view that the decision of the Industrial Court is not tainted with any errors of law, irrationality and/or unreasonableness that warrants the intervention of this court.

[106] As such, the applicant's application for judicial review (encl 7) is dismissed with costs of RM5,000 subject to the allocator fee.

Application dismissed.

Reported by Nabilah Syahida Abdullah Salleh